THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "SMC" BENCH

Before: Shri Waseem Ahmed, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

ITA Nos. 458 & 459/Ahd/2019
Assessment Year 2012-13 & 2013-14

Rameshbhai Arvindbhai Patel, Shaktidham Mandir, Baugh Faliya, Baniyara, Tal. Waghodia, Vadodara-391510 PAN: AVZPP5102A (Appellant)	Vs	The ITO, Ward-3(1)(4), Aayakar Bhavan, Race course circle, Vadodara-390007 (Respondent)

Assessee by: **Shri P B. Parmar, A.R.**
Revenue by: **Shri Umesh Agarwal, Sr. D.R.**

Date of hearing : 05-05-2022
Date of pronouncement : 17-05-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

These two appeals filed by the assessee against the order of the ld. Commissioner of Income Tax (Appeals-3), Vadodara in Appeal nos. CIT(A)-Vadodara-3/10303/2015-16 & CIT(A)-Vadodara-3/10928/2016-17 vide orders dated 22/01/2019 & 28-01-2019 passed for the assessment year 2012-13 & 2013-14 respectively. Since, the issue involved for both the years

are primarily common, we shall dispose of both the appeals by a common order.

2. The assessee has taken the following grounds of appeal:-

ITA No. 458/Ahd/2019 A.Y. 2012-13

"1.00 ADDITION ON ACCOUNT OF CAPITAL GAIN ARISING ON TRANSFER OF LAND BY EVALUATING IT AS AN NON AGRICULTURAL LAND.

1.01 On the facts and circumstances of appellant's case as well as in law, the Hon'ble CIT (A) has erred in confirming erroneous action of ld AO by classifying the agricultural land as non agricultural land and consequently, charging capital gain of Rs. 7,23,742/- arising on sale of such agricultural land as an taxable capital gain though fact of the matter is that the said land is situated outside limit of municipality.

1.02 Your appellant prays Your Honour to hold so now and treat the classification of land as an agricultural land and as a result, delete the addition holding it to be exempt from tax.

2.00 ADDITION U/S 44AD OF THE ACT.

2.01 On the facts and circumstances of appellant's case as well as in law, the ld AO has erred in taxing appellant at 12% of gross receipt as against 8% as prescribed u/s 44AD of the Act.

2.02 Your appellant prays Your Honour to hold so now direct Id AO to treat income at 8% as prescribed u/s 44AD of the Act.

2.00 YOUR APPELLANT CRAVES LEAVE TO ADD, AMEND AND / OR DELETE ALL OR ANY GROUND(S) TAKE HEREINABOVE.

ITA No. 459/Ahd/2019 A.Y. 2013-14

"1.00 ADDITION ON ACCOUNT OF CAPITAL GAIN ARISING ON SALE OF LAND BY EVALUATING IT AS AN NON AGRICULTURAL LAND.

1.01 On the facts and circumstances of appellant's case as well as in law, the Hon'ble CIT (A) has erred in confirming erroneous action of ld AO by classifying agricultural land as an non agricultural land and consequently charging the capital gain of Rs. 17,17,725/- arising on transfer of such land as an taxable capital gain though fact of the matter is that the said land is situated outside limit of municipality.
1.02 Your appellant prays Your Honour to hold so now and treat the evaluation of land as an agricultural land and as a result, delete the addition holding it to be exempt from tax.

2.00 ADDITION OF RS. 1,06,913/- BY DISALLOWING 10% OF TOTAL AGRICULTURAL EXPENDITURE CLAIMED

2.01 On the facts and circumstances of appellant's case and in law, the Hon'ble CIT (A) has erred in confirming disallowance to the tune of 10% of total agricultural expenditure claimed on assumption and presumption.

2.02 Your appellant prays Your Honour to hold so now and delete the said impugned additions made to the total income.

3.00 YOUR APPELLANT CRAVES LEAVE TO ADD, AWIEND AND / OR DELETE ALL OR ANY GROUND(S) TAKE HERE IN ABOVE.

AY-2012-13:

3. The brief facts of the case are that during the year, the assessee sold agricultural lands situated at village- Kotambi, Bhaniyara and Bhavpura, Taluka for total consideration of ₹ 10,30,200/-. The gain on sale of such agricultural lands amounting to ₹ 6,60,504/- was claimed as not taxable in

the return of income under the head "Exempt Income" since the said agricultural lands at the time of sale were situated beyond 8 km from the local limits of Vadodara Municipal Corporation (VMC). During the course of assessment proceedings, the assessing officer issued a show cause notice as to why provisions of section 50C should not be applied to the sale of such lands, because as per Vododara Urban Development Authorities (VUDA) letter dated 22.12.2014, distance from Vadodara Mahanagar Seva Sadan to Bhavpura and Baniyara are within 8 km and hence the land situated in these 2 villages cannot be treated as agricultural land. The assessee submitted that the lands are situated beyond the prescribed limit of 8 km and hence are not capital assets within the meaning of section 2(14) of the Act. However, the AO rejected the assessee's contention and relying on the Town Planner, VUDA's letter (referred to above) specifying the area and distance, held that the land does not qualify as agricultural land and applied the provisions of section 50C of the Act. Accordingly, the AO made an addition of ₹ 7,23,742/- as a LTCG and ₹ 6,88,065/- as STCG in respect of 2 properties applying the provisions of section 50C of the Act. In appeal, Ld. CIT(A) gave part relief to the assessee and after taking into consideration the submissions of the assessee with regard to distance of the 2 properties in question from the municipal limits, he deleted the STCG with respect to land sold in village Bhavpura by holding that this land falls outside the VMC municipal limits, as can be seen from Google Maps. However, Ld. CIT(A) confirmed the addition of ₹ 7,23,742/- as LTCG in respect of land sold in village Bhaniyara on the ground that as per Google Maps, the land was situated within 8 km from VMC limit. The Ld. CIT(A), by granting the relief made the following observations:

"2.3.1 I have considered the facts of the case and gone through the assessment order, remand report of the A.O. and submission of the appellant. The A.O. has made addition of Rs. 7,23,742/- as Long Term Capital Gain and made addition of Rs. 6,88,065/- as Short Term Capital Gain u/s 2(14) on account of sale of agriculture lands situated within 8 k.m. from the VUDA limit. The A.O. in his remand report mentioned that as per the report of the Executive Engineer, Vadodara City (R & B) Division, Bhaniyara village and Bhavpura village are within VUDA limit.

2.3.2 The A.R. was directed to verify the distance of respective places from closest point on the local limit of Vadodara Municipal limit by taking help from Google Map. It is noticed that the village Bhaniyara is situated within limit and village Bhavpura is not within limit.

2.3.3 In view of above verified facts by Google Map with which the A.R too agreed, the disallowance of Rs. 7,23,742/- as Long Term Capital Gain is confirmed for sale of land situated at Bhaniyara village and whereas the disallowance of Rs. 6,88,742/- as Short Term Capital Gain is deleted for the land situated at Bhavpura village as the former is within 8 k.m. from VMC limit ***whereas the latter is outside of 8 k.m. from VMC limit****. Thus, this ground is partly allowed."*

4. Before us, the counsel for the assessee reiterated that the land sold in village Bhaniyara is situated beyond 8 km of VMC limit and accordingly does not qualify as a capital asset under section 2(14) of the Act. Hence, in the instant facts, the assessing officer erred in invoking section 50C of the Act. The learned counsel for the assessee drew attention to pages 16 to 16 A of the paper book which is the distance certificated and population certificate issued by "Talati cum mantri" in respect of the impugned land. He further drew attention to page 30 of paper book containing the Google Maps showing the relevant distance. The counsel for the assessee submitted that

the above evidences were completely overlooked by Ld. CIT(A) who has only given weightage to certificate issued by Executive Engineer, Vadodara. Further, Ld. CIT(A) has given an erroneous finding that even as per Google Maps, land in question was situated within the prescribed limit and the assessee also agreed with the same. On the issue of reliance being placed by CIT (Appeals), on the certificate issued by Executive Engineer, Vadodara, the assessee submitted that it is the "Talati cum Mantri" which was the authority on certifying the distance and the Ld. CIT(A) erred in relying on certificate issued by any other authority. In response, the Ld. Departmental Representative relied upon the observations made by the Ld. CIT(A) in his order.

5. We have heard the rival contentions and perusal the material on record. In our view, whether the land sold in village Bhaniayara is beyond the prescribed limit of 8 km is a question of fact, to be decided by the competent authority. Now the Income Tax Act does not specify as to who is the competent authority to decide/adjudicate upon the issue of distance of agricultural land and the municipality. In the case of **Rita Rajkumar Kochhar v. ITO [2017] 81 taxmann.com 47 (Mumbai)[08-03-2017]**, the tribunal accepted the assessee's contention that Divisional Engineer, PWD, Panvel is the competent authority to determine the distance of the land from the municipal limits. In the case of **Commissioner of Income Tax, Faridabad v. Lal Singh [2010] 8 taxmann.com 114 (Punjab & Haryana)**, the Punjab and Haryana High Court accepted the contention that the village Tehsildar working under the State Government, is competent to measure the distance of the land from the municipal limits. In the case of **CIT v. Smt.**

Sakunthala Rangarajan [2016] 74 taxmann.com 94 (Madras), the High Court held that for the purpose of Section 2(14)(iii)(b) of the Income Tax Act, certificates of the **revenue authorities**, who are competent to measure the land and distance, and whose reports are accepted by the Government for demarcation of the limits of an area and the **certificate of the Public Transport Corporation Ltd**., should be given weightage and accepted. In the case of **ACIT v. Alkesh Kantilal Patel /I.T.A. No.4270/Mum/2015,** it was held that certificate from Executive Engineer Ahmadabad and certificate of Sarpanch of the Village, cannot be relied upon since they are not competent authority as prescribed under law and it is the village Tehsildar who is the competent authority to issue certificate regarding the distance. Therefore, there is no specific authority who has been designated as being the "competent authority" to measure distance between the land sold and the municipal limits. The assessee before us contended that it is the "Talati cum Mantri" who is the competent authority and reliance cannot be placed on the report of Executive Engineer, Vadodara, on which reliance has been placed by the Ld. CIT(A) while adjudicating the issue of distance against the assessee in respect of land situated at Bhaniyara village from VMC. Therefore, while the assessee is relying on the certificate issued by "Talati cum Mantri" and Google Maps (copies of which have been placed before us) for ascertaining the distance between the impugned land situated at Bhaniyara village and the VMC limits, the Ld. CIT(A) has relied upon the report of Executive Engineer, Vadodara (R and B) division (on the basis of remand report issued by Ld. Assessing Officer) and also the Google Maps to decide that the distance is beyond the prescribed limit of 8 km. We are of the considered view, that since there is no prescribed authority to decide upon

the distance between the village land and the limit of the closest municipal Corporation, therefore, we are unable to accept the assessee's argument that the report of Executive Engineer, Vadodara (R and B) division cannot be relied upon for determining the distance between the impugned land at village Bhaniyara and the nearest local municipal Corporation. However, at the same time, before reliance is placed on any document/ report by the Ld. CIT(A) which is proposed to be used against the assessee while holding that the village land is not an agricultural land, he is bound to give the opportunity to the assessee to rebut the evidence being used against him. Also, the Ld. CIT(A) should also consider the evidence placed by the assessee on record i.e. report of "Talati cum Mantri regarding certificate of distance of impugned land from VMS and give his observations as to why the report placed by the assessee in support of his contention cannot be relied upon or whether there is any factual inaccuracy in such report. It may be important to point out, that for the impugned assessment year, it has been clarified by the CBDT vide Circular No.17/2015 [f.no.279/misc./140/2015-itj] dated 6-10-2015 that that the distance between the municipal limit (VMC in this case) and the agricultural land is to be measured **having regard to the shortest road distance**. The relevant extracts of the Circular are reproduced for ready reference:

Circular No. 17/2015, Dated: October 06, 2015

Subject:- Measurement of the distance for the purpose of section 2(14)(iii)(b) of the Income-tax Act for the period prior to Assessment year 2014-15

> *"Agricultural Land" is excluded from the definition of capital asset as per section 2(14)(iii) of the Income-tax Act based, inter-alia, on its proximity to a municipality or cantonment board. The method of measuring the distance of the said land from the municipality, has given rise to considerable litigation. Although, the amendment by the Finance Act, 2013 w.e.f. 1.04.2014 prescribes the measurement of the distance to be taken aerially, ambiguity persists in respect of earlier periods.*
> *2. The matter has been examined in light of judicial decisions on the subject. The Nagpur Bench of the Hon. Bombay High Court Vide order dated 30.03.2015 in ITA 151 of 2013 in the case of Smt. Maltibai R Kadu has held that the amendment prescribing distance to be measured aerially, applies prospectively i.e. in relation to assessment year 2014-15 and subsequent assessment year. For the period prior to assessment year 2014-15, the High Court held that the distance between the municipal limit and the agricultural land is to be* ***measured having regard to the shortest road distance****. The said decision of the High Court has been accepted and the aforesaid disputed issue has not been further contested.*
> *3. Being a settled issue, no appeals may henceforth be filed on this ground by the officers of the Department and appeals already filed, if any, on this issue before various Courts/Tribunals may be withdrawn/ not pressed upon. This may be brought to the notice of all concerned.*

5.1 In light of the above observations, we think it fit in the interest of justice to restore the matter to the file of Ld. CIT(A) to take a decision afresh, on facts, in light of direction issued vide CBDT Circular No.17/2015 [f.no.279/misc./140/2015-itj] dated 6-10-2015 (*Measurement Of Distance For Purpose Of Section 2(14)(iii)(b) For Period Prior To Assessment Year 2014-15)* and after taking into consideration the certificates placed on record by the assessee in support of the proof of distance between the land situated at village Bhaniyara and VMC (report of Talati cum Mantri and any other certificate the assessee may wish to place reliance upon) and also if the Ld. CIT(A) wishes to place reliance on any certificate issued by any competent

authority, the assessee may be provided the opportunity to examine the same/ rebut the same. Accordingly, on this issue, the matter is being restored to the file of the Ld. CIT(A) with the above directions.

6. In the result, ground number 1 of the assessee's appeal is allowed for statistical purposes.

Ground number 2: addition under section 44AD of the Act:

7. The brief facts in relation to this ground of appeal are that during the year under consideration, there was a cash deposit of ₹ 58,89,000/- in the assessee's bank account held with Cosmos Bank. Before the AO, the assessee submitted that the above receipts were on account of contract receipts for construction of temple and the assessee has offered 8% of such receipts as his income u/s 44AD of the Act. The assessee submitted that he has not maintained any books of accounts. However, the AO held that looking into the frequency and depth of the transactions made by the assessee, AR has agreed for an addition of 12% of the receipts offered amounting to ₹ 7,06,680/-. The assessee did not file an appeal against this addition before Ld. CIT(A). However, in the subsequent assessment year that is AY 2013-14, on similar facts, the Ld. CIT(A) has accepted assessee's appeal and restricted the addition to 8% of receipts under section 44AD of the Act. The assessee has accordingly filed an appeal before us in respect of the addition of 12% under section 44AD of the Act, seeking us to direct the AO to treat income at the rate of 8% as prescribed under section 44AD of the Act.

8. We note that on similar set of facts, Ld. CIT(A) in appeal for immediately succeeding year that is assessment year 2013-14, has allowed the assessee's appeal. Since, the appeal of the assessee in respect of ground number 1 mentioned above is being restored to the file of Ld. CIT(A) for his consideration, keeping in view the principles of consistency, wherein the courts have held that when the facts & circumstances continue to remain the same, then there should not be any variation in the treatment from earlier year, in the interest of justice, we are restoring this matter to Ld. CIT(A) to grant relief if there are no change in facts as compared to facts for assessment year 2013-14. Accordingly, ground number 2 of the assessee is appeal is allowed.

9. In the result, ground number 2 of the assessee's appeal is allowed.

10. In the result, for AY 2012-13, appeal of the assessee is partly allowed for statistical purposes.

Assessment Year 2013-14:

Ground No. 1: the addition on account of capital gain arising on sale of land by evaluating it as an non agricultural land:

11. For assessment year 2013-14, the counsel for the assessee submitted that for this year the facts are similar to the immediately preceding year i.e. AY 2012-13, wherein a different land was sold in AY 2013-14, but it was

located in the same village (Bhaniyara). Since the facts for AY 2013-14 are similar to AY 2012-13, in the interests of justice, we are restoring the matter to the file of Ld. CIT(A) to take a decision afresh, on facts, in light of direction issued vide CBDT Circular No.17/2015 [f.no.279/misc./140/2015-itj] dated 6-10-2015 (*Measurement Of Distance For Purpose Of Section 2(14)(iii)(b) For Period Prior To Assessment Year 2014-15)* and after taking into consideration the certificates placed on record by the assessee in support of the proof of distance between the land situated at village Bhaniyara and VMC (report of Talati cum Mantri and any other certificate the assessee may wish to place reliance upon and also if the Ld. CIT(A) wishes to place reliance on any certificate issued by any competent authority, the assessee may be provided the opportunity to examine the same/ rebut the same. Accordingly, on this issue, the matter is being restored to the file of the Ld. CIT(A) with the above directions.

12. In the result, ground number 1 of the assessee's appeal is allowed for statistical purposes.

Ground No. 2 addition of Rs. 1,06,913/- by disallowing 10% of total agricultural expenditure claimed:

13. The brief facts of this ground are that during the year, the assessee had shown gross agricultural income of ₹ 16,96,493/- and claimed expenditure on account of agricultural expenses amounting to ₹ 10,69,130/- and declared net agricultural income of ₹ 6,27,363/-. The assessing officer observed that expenses claimed by the assessee to the extent of 60% of gross

agricultural receipts are excessive and asked the assessee to submit bills/vouchers and other supporting in respect of claim of agricultural expenses. The assessee submitted copy of extract of 7/12 in respect of proof of agricultural lands and also submitted bills of sale of agricultural produce, but has not submitted bills and supporting of expenses. Therefore, in absence of any bills and other supporting evidence in respect of agricultural expenses, the AO made disallowance of 20% of agricultural expenses amounting to ₹ 2,13,826/-. In appeal, the Ld. CIT(A) restricted the addition only to the extent of 10% of agricultural expenditure of ₹ 10,69,493/- and directed the balance to be deleted i.e. ₹ 1,06,949/- was disallowed and balance of ₹ 9,62,544/- was directed to be allowed. Before us, counsel for the assessee submitted that confirmation of disallowance of 10% of agricultural expenses is excessive since the assessee had submitted statement showing agricultural income and expenses (page 40 of paper book), proof of land holding, bills with respect to sale of agricultural produce and therefore under such circumstances the impugned disallowance confirmed by Ld. CIT(A) to the extent of 10% of agricultural expense is unwarranted. Alternatively some token disallowance maybe confirmed. The Ld. Departmental Representative relied upon the observations made by the Ld. CIT(A) in his order.

14. We have heard the rival contentions and perusal the material on record. In our view, the reasons for disallowance of agricultural expenses is that initially, the assessee had claimed almost 60% of agricultural receipts as agricultural expenses. When asked to produce the relevant supporting bills/voucher or any other supporting documents to evidence the agricultural

expenses, the same were not produced before the Ld. Assessing Officer, who in absence of any supporting documents disallowed 20% thereof. In appeal, the Ld. CIT(A), restricted disallowance to 10% of the expenses. We note that while the assessee has given a summary list of details of agricultural expenditure viz. electricity and diesel expenses, fertilizer and pesticide expenses, ploughing and labour charges, seeds purchased, depreciation, however, the assessee has not produced any supporting bills/vouchers/documents in support of his claim of incurring the expenditure before any of the authorities. Accordingly, in our view, the Ld. CIT(A) has not erred in facts and in law in restricting the disallowance to 10% of agricultural expenses in absence of any bills/vouchers/supporting evidence produced in support of proof of claim of expenditure. In the result, ground number 2 of the assessee's appeal is dismissed.

15. In the result, the appeal of the assessee is partly allowed for statistical purposes.

16. In the combined result, ITA 458/Ahd/2019 is partly allowed for statistical purposes and ITA 459/Ahd/ 2019 is partly allowed for statistical purposes.

Order pronounced in the open court on 17-05-2022

Sd/-	**Sd/-**
(WASEEM AHMED)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 17/05/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद